tional antitrust policy. *Perma-Life Mufflers, Inc. v. International Parts Corp.*, 392 U.S. 134 (1968). What countervailing policy warrants the restriction of the damage action in the present case, merely because the petitioner's legally protected property interest is not tangible property which can be seen with the naked eye? It is clear that the respondents' conduct is of the type that the antitrust laws seek to prohibit, and the interest of petitioner is "... within the zone of interests to be protected by ..." such laws. See *Association of Data Processing Service Organizations, Inc. v. Camp*, ____ U.S. ____, 90 S. Ct. 827, 830 (1970).

As this Court has stated on numerous occasions, in order to prevail under the Clayton Act, plaintiff need only prove a violation of the antitrust laws and resultant damage. *Radiant Burners v. People's Gas & Light Co.*, 364 U.S. 656, 660 (1961); *Radovich v. National Football League*, 352 U.S. 445, 453-454 (1957); *Continental Ore Co. v. Union Carbide and Carbon Corp.*, 370 U.S. 690, 697 (1962); *Perkins v. Standard Oil Co. of California*, 395 U.S. 642 (1969).

In our present case, petitioner, the State of Hawaii, has alleged that respondents conspired to fix prices, which is a clear violation of Section 1 of the Sherman Act. Petitioner has also alleged that, as *parens patriae*, and by reason of respondents' antitrust violation, it has suffered substantial injury to interests which are protected by the "antitrust acts". The only question, then, relates to the calculation of the amount of damages. Clearly, this issue must not be decided as a matter of law. The issue of damages is for the jury and the jury

may ". . . act upon probable and inferential as well as upon direct and positive proof. . . ." "The jury may make a just and reasonable estimate of the damage based on relevant data and render its verdict accordingly." "The most elementary conceptions of justice and public policy require that the wrongdoer shall bear the risk of the uncertainty which his own wrong has created." *Bigelow v. RKO Radio Pictures, Inc.*, 327 U.S. 251, 264-265 (1946).

Modern technological and scientific advances have made it possible to determine the impact upon the economy of various anti-competitive and anti-social factors. See, for example, Isard, *et al., On the Linkage of Socio-Economic and Ecological Systems,* 21 Papers of the Regional Science Ass'n, p. 79 (1968). As one commentator has observed:

> "The mathematical skills of economists and the availability of data about the economy have increased greatly in the last twenty years. Econometricians can now make rough mathematical descriptions of the key features of even so complex a system as the United States economy, and by means of input-output analysis, they can make crude estimates of damage to a regional economic unit. These calculations may be sufficiently precise for the measurement of damages in tort litigation. Moreover, in antitrust litigation the requirements of certainty of damages are applied more liberally in favor of the plaintiff than at common law. Further, it has long been recognized that exactness in measurement of damages is not necessary; it is sufficient that a reasonable basis for computation exists." *State Protection of Its Economy and Environment: Parens Patriae Suits for Damages,*

6 Columbia Journal of Law and Social Problems, 411, 419-420 (1970).

The same commentator, in addressing himself to our present case of alleged price-fixing in the oil industry, has articulated at least one specific way in which the antitrust violation here alleged has caused tangible economic injury to the State of Hawaii. The price increase caused by the respondents' price-fixing conspiracy could well be shown to have reduced the demand for and total consumption of motor gasoline thus directly affecting the tax revenues (assessed per gallon of gasoline sold) collected by the State of Hawaii. 6 Columbia Journal of Law and Soc. Problems at pp. 414-417. This is but one example of the type of evidence which could be presented for the jury's use in measuring the damage suffered herein by petitioner as *parens patriae*. Compare Mr. Justice Brandeis statement in *Keogh v. C. & N. W. Ry. Co.*, 260 U.S. 156, 165 (1922) cited in respondents' brief (p. 6, footnote 5).

In the final analysis, then, the standing of the State of Hawaii to maintain this present action under Section 4 of the Clayton Act is governed by the cases discussed above and summarized by this Court's observation in *Continental Ore, supra:*

> "Where plaintiff proves a loss, and a violation by defendants of the antitrust laws of such a nature as to be likely to cause that type of loss, there are cases which say that *the jury*, as the trier of the facts, *must be permitted to draw from this circumstantial evidence the* inference that the necessary causal relation exists." *Continental Ore Co. v. Union Carbide & Carbon Co., supra,* 370 U.S. at p. 697 (Emphasis added.)

The decision herein by the United States Court of Appeals for the Ninth Circuit substantially emasculates the rulings by this Court in the decisions discussed above. Thus, certiorari should be granted to clarify the present status of the law with respect to standing under Section 4 of the Clayton Act.

II. THE INJURY SUFFERED BY THE STATE OF HAWAII, AS PARENS PATRIAE, IS NOT "INDIRECT AND CONSEQUENTIAL", BUT IS ONE RECOGNIZED BY LAW FOR WHICH THE REMEDY OF DAMAGES IS APPROPRIATE AND PROPER.

Petitioner has thus far established that:

(1) The injury to the economy, prosperity and well-being of the State caused by a widespread antitrust conspiracy gives rise to a cause of action by the State as *parens patriae* (*Georgia v. Pennsylvania Ry. Co., supra.*)

(2) Under the *Georgia* case, such an injury is recognized by law and, therefore, is an injury to a "property" interest of the State within the meaning of the "antitrust acts", specifically Section 4 of the Clayton Act (*Waldron v. British Petroleum Co., supra*) as well as Section 16 (*United States v. Borden Co., supra*);

(3) The dollar amount of the injury to petitioner as *parens patriae* can be demonstrated by relevant economic data at trial and thus, the determination of such damages, if any, must be left to the jury. (*Bigelow v. RKO Radio Pictures, Inc., supra.*)

Of equal importance, all relevant policy considerations here militate in favor of allowing the *parens patriae*

damage action as the only feasible alternative to the respondents' retaining the enormous illegal profits which they have derived at the expense of the economy and consumers of the State of Hawaii, by virtue of their price-fixing conspiracy.

Decisions such as that of the Ninth Circuit in the instant case and *Philadelphia Housing Auth. v. American Radiator & Standard Sanitary Corp.*, 309 F.Supp. 1057 (E.D. Pa. 1969) (heavily relied upon by respondents in their brief herein) ignore these legal and policy considerations. Instead by narrowly reading and restrictively applying Section 4, such decisions foreclose civil antitrust actions which this Court's prior rulings would clearly allow.

Nowhere is this "anti-antitrust" attitude more clearly demonstrated than in that portion of the Ninth Circuit Court's opinion below concerning the "indirect" nature of the injury suffered by the State of Hawaii as *parens patriae*. Such concepts as "indirect" injury, "target area", "consequential" injury, "remote" injury and the like have been too frequently used by lower federal courts to restrict the availability of the treble-damage remedy to antitrust plaintiffs. It is as though these courts believe that the enforcement of the antitrust policy of the United States should be restricted rather than encouraged. These rulings have been made in the face of this Court's numerous and specific directions to the contrary. *Mandeville Island Farms, Inc. v. American Crystal Sugar Co.*, 334 U.S. 219, 236 (1948); *Radovich v. National Football League, supra*. Nevertheless, the restrictive rulings persist and antitrust enforcement suffers. (See, for example,

V.T.R. v. Goodyear Tire and Rubber Co., 303 F.Supp. 773 (S.D.N.Y. 1969); *Fields Productions, Inc. v. United Artists Corp.*, 318 F.Supp. 87 (S.D.N.Y. 1970) *affirmed*, 432 F.2d 1010 (2d Cir. 1970); *Billy Baxter, Inc. v. Coca-Cola Co.*, 431 F.2d 183 (2d Cir. 1970); *SCM Corp. v. RCA*, 276 F.Supp. 373 (S.D.N.Y. 1967) *affirmed* 407 F.2d 166 (2d Cir. 1969); and, of course, the Ninth Circuit decision herein. This Court should grant certiorari in the present case in order to resolve this important question concerning the restrictive limitations which these decisions have engrafted upon the standing of antitrust plaintiffs under Section 4.

Particularly, in the instant case, this Court should reaffirm its ruling in *Georgia v. Pennsylvania Ry. Co., supra*, establishing that an injury to the economy of a State is a direct and foreseeable result of the type of anti-competitive conduct alleged against respondents herein; and, therefore, a civil action to remedy such an injury may be maintained by the State as *parens patriae* under the "antitrust acts" including Section 4 of the Clayton Act. See: *Hoopes v. Union Oil Co.*, 374 F.2d 480 (9th Cir. 1967); *South Carolina Council of Milk Producers v. Newton*, 360 F.2d 414 (4th Cir. 1966); *Mulvey v. Samuel Goldwyn Productions*, ... F.2d ..... (9th Cir., Oct. 20, 1970).

This Court should specifically reject the artificial limitations and "judicial glosses" which lower federal courts have engrafted upon the standing requirements of Section 4. The State of Hawaii, as *parens patriae* should be accorded standing thereunder in order to remedy the enormous economic damage which it has suffered by reason of respondents' violation of the antitrust laws.

III. THE STATE OF HAWAII, AS PARENS PATRIAE, SHOULD BE PERMITTED TO MAINTAIN THIS ACTION UNDER SECTION 4 OF THE CLAYTON ACT AS THE REPRESENTATIVE OF THE INTERESTS OF ITS CITIZENS.

Petitioner's primary theory in support of its present damage action as *parens patriae* is based on the principle that the injury to its economy is separate and apart from the individual injuries to its consumer-citizens who were, as a result of the respondents' anticompetitive conspiracy, charged excessive prices for gasoline. Independent of the above theory, however, there exists an additional and alternative basis for permitting petitioner to maintain the present action. In the words of the amended complaint: petitioner brought "... this action by virtue of its duty to protect the general welfare of the State and its citizens, acting herein as *parens patriae,* trustee, guardian and representative of its citizens, to recover damages. ..." (R. 50)

Notwithstanding the assertion of the respondents (Brief, p. 14), the fact that the District Court and Court of Appeals below rejected or refused to consider this theory does not remove it from the case. Petitioner urges this Court to recognize that, historically, the *parens patriae* action was appropriate in cases such as our present one where a widespread, pervasive injury adversely affected so large a portion of the State's population that individual remedies were foreclosed as impractical. In such cases the most effective remedy was recognized to be an action by the State as trustee, guardian and *parens patriae* on behalf of its citizens. And the fact that the citizens were individually injured by the wrongdoer did not preclude the standing of the State

as *parens patriae*. *Georgia v. Tennessee Copper Co.*, 206 U.S. 230 (1907); *New York v. New Jersey*, 256 U.S. 298, 301-302 (1921).

Respondents in their brief (at p. 15) allude to the "specific language of Section 4" and the requirement that the injury be to the plaintiff's business or property and that plaintiff recover the damages ". . . *by him* sustained . . ." Respondents once more ignore the fact that this language must be read and construed in light of the public purposes and policies which favor a liberal interpretation of the treble-damage antitrust remedy in promoting antitrust enforcement. It must further be recognized that in the *parens patriae* context, the "people" (citizens-consumers here involved) are the state, and, as such, an injury to the business or property of a vast portion of the citizenry is an injury to the State.

A restrictive and narrow reading of Section 4, as urged by the respondents, would have precluded the result reached by this Court in *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481 (1968). Such narrow readings of the Act have created the chaos and limitations on the civil damage action in the various "standing" cases ("indirect" injury, "target area", etc.) Such restrictions are backward steps in our jurisprudence and, as would be the case if the Ninth Circuit Court's decision herein stands, usually result in the wrongdoers retaining the fruits of their illegal activities, 392 U.S. at p. 494. Such a result is clearly inconsistent with national antitrust policy and with our traditional notions of justice.

On the other hand, should this Court, consistently with historical precedents, construe the scope of the *parens*

patriae suit to include representation by the State of the interests of citizens and consumers, and to permit damages to be recovered, the *parens patriae* action would become the most effective and socially desirable means for remedying major antitrust violations such as the one alleged herein. *Wrongs Without Remedy,* 43 So. Cal. L. Rev. 570, 594-595 (1970).

In the final analysis, such a decision would be good law, good policy and good sense.

CONCLUSION

For the foregoing reasons, as more fully discussed in the Petition previously filed herein, the State of Hawaii respectfully requests that this Honorable Court grant the Petition for Writ of Certiorari and resolve the important issues presented therein.

Dated, January 15, 1971.

Respectfully submitted,

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